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No. 86-555

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

INTERNATIONAL FRUIT PRODUCTS COMPANY, INC. et al.,

Petitioners

vs.

JAMES BRYANT et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court correctly interpret the pension plan as prohibiting any amendment permitting the employer to recapture assets of the plan?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 793 F.2d 118 (6th Cir. 1986) and the opinion of the District Court is reported at 640 F. Supp 890 (S.D.Ohio 1985).

FEDERAL STATUTE INVOLVED

The statute involved in this case is the Employee Retirement Income Security Act of 1974 (ERISA) as amended 29 U.S.C. Sections 1001 et seq.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY INTERPRETED THE INTENT OF THE PENSION PLAN TO PROHIBIT THE EMPLOYER FROM RECAPTURING TRUST ASSETS

ERISA prohibits distribution of the residual assets of pension plans unless "The plan provides for such distribution in these circumstances." ERISA Section 4044(d)(1)(C) 29 U.S.C. 1344(d)(1)(C). The sole issue in this case was the intent of the pension plan. Did the plan prohibit the employer from recapturing the surplus?

This is not a case of statutory construction.[1] It boils down to an issue of

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[1] Petitioner is 100% wrong to suggest that ERISA favors reversion of the surplus to the employer in the face of a plan forbidding such reversion. There is nothing in ERISA's language or history to support such an argument. The authorization of a reversion under the limited circumstances contained in Section 4044(d)(1)(C) is an exception to the general "exclusive benefit rule" set forth in Section 403(c)(1). It is beyond dispute that such exceptions should be read narrowly, Kross vs. Western Electric Co., 701 F.2d 1238 (7th Cir. 1983).

plan interpretation What was the intent and purpose of the disputed language set forth in Sections 5.3 and 13.1 of the 1959 plan:

> Section 5.3 "In no event and under no circumstances shall any contributions to this trust...be repaid to the employer"
>
> Section 13.1 "No amendment shall cause or permit any part of the trust estate...to be repaid to the employer"

The Sixth Circuit Court of Appeals was correct in holding that this prohibition against recapture was "absolute" and "unequivocal" and that the intent was, as expressed within the four corners of the plan.

Words must be given their plain, ordinary, and popular meaning in the absence of evidence indicating a different meaning. Corbin on Contracts, Vol. 3 pgs. 106-107. The employer produced no extrinsic evidence of any intent contrary to the crystal clear prohibitions of the plan.

The Plaintiff did produce extrinsic evidence. The employee handbook stated at pg. 8:

> "Funds paid into the trust can never be refunded to the Company..can never under any circumstances, revert to the company."

The Court noted that the handbook's language was an indication of intent that the guarantee "was not limited to the funds in the trust that may be required to pay prescribed benefits." The Court's interpretation was consistent with the reasonable expectations of the employees, or any other reader of the handbook and plan. The employer's actuary expert witness, hired to handle the termination, supported Plaintiffs, testifying as follows concerning the disputed Section 13.1:

> "If that provision was in effect then I am sure that the money would have been distributed to the people, rather than going back to the company...
> (Crist deposition pg. 27)

Other well settled rules favored plaintiffs. It is hornbook pension plan doctrine that "...Where the employer established the terms of a pension plan, those terms should be construed in favor of the employee", Hoefel v. Atlas Tack Corp., 581 F.2d 1 84 LC 10,771 (1st Cir. 1978). If there were any ambiguity, the Court should adopt the meaning less favorable to the employer draftsman who selected the words. 3 Corbin on Contracts, Chapter 24 Section 559 at 262 (1950).

Petitioners argue that the Court should have ignored the strong language of Section 5.3 and focused solely upon Section 13.1. Nonsense. First of all Section 5.3 by its words, "In no event and under no circumstances..." established restrictions on any future amendments and was itself an "anti-amendment section".[2]

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[2] The Sixth Circuit noted:
"This language in itself precludes an amendment that would allow money once contributed to be reclaimed" (p.8a Appendix A

Secondly, the court had every right and duty to analyze other terms of the plan in order to find the intent of Section 13.1, deemed the anti-amendment section. As stated by the Court:

> "An agreement that provides that an act can occur in no event and under no circumstances cannot be converted into one that permits the act by a series of amendments that deletes the reference to the prohibition and then adds a provision permitting the forbidden act."

(pg. 8a, Appendix A Petitioner's brief)

In sum, there was not the slightest ambiguity in the anti-reversion, anti-amendment features of the plan.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

This was a garden variety contract- type pension plan interpretation case. As the Sixth Circuit opinion noted:

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to Petitioners Brief).

> "Each case of this kind is controlled by the language of the documents creating the particular plan involved."

(p.9 of Appendix Petitioners Brief)

There are many cases of this kind. In each, the courts undertake painstaking study, and analysis of all the facts and circumstances of the particular plan involved. In some cases the courts rule in favor of the employees, and prohibit recapture Delgrosso v. Spang Co., 769 F. 2d 928 (3rd Cir. 1985), Audio Fidelity v. PBGC, 624 F2d 513 (4th Cir. 1980). Kruzynski v. Richard Brothers Punch Co., _____F.Supp.___ (ED of Mich 1978) 211 BPR/D-8). The employer was successful in the Moyer, Washington Star and Pollock cases cited by Petitioner.[3] The result was different from the case at bar. But there is no conflict of

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[3] C. D. Moyer Company Pension Trust, 441 F. Supp. 1128 (E.D. Pa. 1977), aff'd without opinion, 582 F.2d 1283 (3d Cir. 1978); Pollock v. Castrovinci, 476 F. Supp. 606 (S.D.N.Y. 1979), aff'd without opinion, 622 F.2d 575 (2d Cir. 1980); Washington-Baltimore Newspaper Guild vs. Washington Star Co., 555 F. Supp. 257 (D.D.C. 1983), aff'd without opinion, 729 F.2d 863 (D.C. Cir. 1984).

legal principles only a difference in facts.

None of the three circuits have spoken concerning the issues raised by Petitioners. All three of the cited district court cases were affirmed without opinion. It can hardly be said that the Circuits have set forth reasoned articulated views on the subject when they have failed to write opinions.

Furthermore as to Moyer, the dissent correctly points out that "the continuing vitality of Moyer is somewhat questionable in light of Delgrosso v. Spang & Co., 769 F2d 928 (3rd Cir. 1985)."

In all events, the plans in Washington Star and Pollock did not contain specific prohibition against recapture language as herein but only broad more typical "exclusive benefit" language.[4]

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[4] The prohibition herein was that no assets shall "revert to or be repaid to the employer." (5.3) No amendment shall...permit any part...to revert to or be repaid to the employer." (13.1) No such express and specific prohibition appears in the Pollack or Washington Star plans.

Also, in Moyer and Pollock, the district court relied heavily on plan provisions absent in the case at bar (the "scheme of priorities in the event of...termination" Moyer; other "various provisions...dealing with termination" Pollock).

None of the plans in the three cited cases contained extrinsic evidence of intent as set forth in the employee handbook. None contained the powerful language of Section 5.3:

> "In no event and under no circumstances shall any contributions...revert to or be repaid to the employer."

As the Sixth Circuit stated:

> "...the unequivocal prohibition against recapture of any contributions to the fund set this case apart."

In sum, the district courts in Moyer, Pollock, and Washington Star, were interpreting different plans, containing different language and provisions exhibiting

differing intent. These cases cite no rule of law contrary to the principles followed by the Sixth Circuit.

III. THIS CASE DOES NOT INVOLVE ANY IMPORTANT QUESTION OF FEDERAL LAW

This is not a case interpreting any federal statute. There is no debate about the meaning of any words of ERISA. All agree that ERISA forbids the recapture by the employer of residual assets of pension plan unless the listed requirements of Section 4044(d)(1) are met.

The sole issue in this case is one of pension plan interpretation. Neither ERISA, nor federal common law, or state law contains any specific public policy requiring the Courts to disregard the plain unambiguous meaning of the words of a plan.

The employer makes non-legal arguments concerning the alleged unfairness of the result. The employees were unskilled union

workers. Pension contributions were part of compensation for their services. Plaintiffs expected to work until retirement. Instead they were let go at a much earlier date, suddenly, without warning, or severance pay. They were not paid the benefits they expected at retirement but only the actuarial equivalent. It would be unfair to give a windfall to the employer who never planned on recovering the contributions. In all events, there is no federal policy against employees receiving an extra benefit upon termination.

We trust that petitioner's "scare tactics" will be ignored. An employer's duty to make proper contributions to a pension fund according to normal actuarial, legal, and accounting requirements is not changed one iota by this case. An employer is still free to write or amend his plan as it deems fit, so long as there is no breach of the terms of the plan.

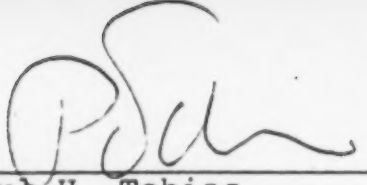
In sum, whether the employees received a "windfall" and whether employers are unhappy with the decision are not important issues of federal law.

CONCLUSION

This case is not appropriate for certiorari. There is no issue of statutory interpretation. There is no rule of law at stake. The principle issue was whether there should be a strict interpretation of the special unique restrictions in this particular pension plan. There is no conflict of legal principles among the circuits. This was a question of intent - appropriate for the lower federal courts to resolve on a case by case basis, based on all the facts and circumstances of each particular case.

The petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing document have been sent to Harold S. Freeman, Esq., Dinsmore & Shohl, 2100 Fountain Square Plaza, 511 Walnut St., Cincinnati, Ohio 45202, Counsel for Petitioners on this 30 day of October, 1986.

Paul H. Tobias